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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)
)

PP Docket No. 93-285

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To: The Commission

**COMMENTS OF NTFC CAPITAL CORPORATION
IN SUPPORT OF NATIONSBANK'S
PETITION FOR LIMITED RECONSIDERATION**

NTFC Capital Corporation ("NTFC") hereby submits its Comments in support of the Limited Petition for Reconsideration of the *Fifth Memorandum Opinion and Order* filed in the above-captioned proceeding by NationsBank ("Petition"). NTFC is a wholly-owned subsidiary of General Electric Capital Corporation and has been active for over fifteen years in financing a variety of telecommunications ventures, including equipment financing and project financing for the construction and operation of cellular systems both in MSAs and in RSAs.

NTFC has been following the Commission's PCS proceedings closely because it is interested in providing equipment financing and/or project financing for successful PCS bidders, including successful bidders in the entrepreneurs blocks ("designated entities" or "DEs"). Like NationsBank, however, NTFC is concerned that the Commission's rules allowing the Commission to

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declare a PCS authorization forfeit if a DE defaults on its installment payments materially increases the risks associated with any loans to those entities. As a result, those rules substantially inhibit the willingness of lenders, like NTFC, to provide financing to DEs, at least on terms and conditions that will not, in themselves, impose burdens on DEs which are not borne by other communications borrowers.

NationsBank's proposals would significantly alleviate many lenders' concerns about financing DEs, and thus would enhance the availability of loan financing to DE's. Such traditional loan financing should be encouraged because it does not pose the same threat to the independence of the DEs that equity financing may: there is little change that the third-party lender, and not the DE, is the real-party-in-interest. The adoption of NationsBank's proposals would thus allow the Commission to further the Congressional goals of increasing the diversity of ownership of telecommunications facilities by maximizing DEs' access to capital, without exposing the DE system to potential abuse.

I. The Commission's Current Rules Will Inhibit Lenders From Providing Financing to DEs

Throughout this proceeding, the Commission has sought to facilitate the ability of minorities, women and small businesses to participate in the exciting and promising PCS business. To this end, it has set aside spectrum for DEs and has provided bidding credits, installment payments and deferred interest plans. The Commission has recognized, however, that the most

significant deterrent to successful DE participation in the PCS auctions is the inability to find capital. Thus, the Commission has devoted substantial energy to developing rules which will permit non-DEs to provide capital to DEs, but will ensure that the DEs remain in control of their PCS systems.

Notwithstanding that effort, the Commission has consistently included in these proceedings a rule providing that a DE will lose its PCS license if it defaults on an installment payment. While NTFC recognizes that the Commission must protect its ability to receive the price bid by a DE for PCS spectrum, NTFC also believes that this rule has the perverse effect of impairing the ability and willingness of lenders like NTFC to provide financing to DEs. Under this rule, a lender will be unable to protect its loan by requiring the sale of an operating system on default, and will be left with only the PCS assets as security for its loan.

While the Commission re-visited this rule in its *Fifth Memorandum Opinion and Order*, it did not provide lenders any material relief. Rather, the Commission merely reiterated that it would consider giving defaulting licensees a grace period of three to six months, would allow licensees and lenders to work out alternative arrangements for payment to the Commission to avoid the loss of the license and would continue to recognize a bankruptcy case as creating an involuntary transfers of the license. *Id.* at ¶¶ 129-34.

As NationsBank points out, those actions do not provide sufficient protection for lenders to DEs. Among other things, the fact that the grace period is discretionary with the Commission will create uncertainty for the lender, and the length of the grace period in many cases will not be sufficient to allow for a meaningful workout or sale of the DE's assets. Additionally, the Commission's recognition of a bankruptcy as an involuntary transfer of the license does not offer lenders much comfort. In bankruptcy, neither the Commission nor the other parties could predict the outcome with any certainty, and all parties would be exposed to additional costs, losses and delays. Because of the problems associated with bankruptcy, the Commission's rules should as NationsBank argues, encourage and facilitate pre-bankruptcy work-outs.

Adoption of NationsBank's proposal has other public interest benefits. First, loan financing is less expensive than equity financing. Second, loan financing does not pose the risks that an equity investor, rather than the DE, will ultimately acquire or control the facility. In view of these benefits, the Commission should modify its rules as suggested by NationsBank to enhance the ability of DEs to obtain loans to finance their operations. In so doing, the Commission will advance the Commission's and Congress' objective of assisting minorities, women and small business in participating in the PCS business.

II. The Commission Should Adopt NationsBank's Proposals

The three proposals advanced by NationsBank will meaningfully reduce the risks which the Commission's current rules impose. NationsBank urges the Commission (a) to allow lenders to arrange for the transfer of a PCS authorization to a non-DE when, after a six-month effort, a qualified DE purchaser cannot be found, (b) to clarify that it will not cancel DE licenses when the DE defaults on its installment payments but rather will allow, as it does in bankruptcy proceedings, the license to be transferred in connection with a workout or reorganization, and (c) to enter into intercreditor agreements with lenders. Adoption of NationsBank's proposal would encourage debt financing to DEs, reduce the risks and costs of bankruptcy, benefit the DE's customers and increase the Commission's chances of recovering the amount originally bid by a defaulting DE. NTFC urges the Commission to adopt these proposals.

Assignment to Non-DE Purchasers

First, the requirement that a DE transfer its authorization only to other DEs during the first five years after grant of the authorization was adopted to deal with concerns that have little, if any, relevance when the assignment is necessitated by financial distress. That requirement was designed to assure that the DE is the real-party-in-interest in the PCS application, that the application is not a device to allow non-DE applicants to take advantage of the DE rules, and that the DE is given a meaningful opportunity to manage and operate the system. Where

the DE is in default on its installment payments, these concerns no longer have relevance, and thus should not preclude the assignment of the PCS license to a non-DE, especially under the limited circumstances proposed by NationsBank.^{1/}

Forfeiture of the License

Second, it is essential to any significant loan financing of DEs that the Commission not declare a PCS license forfeit if a defaulting DE and its creditors are attempting to work-out the financial situation. The Commission's current approach of allowing at best only a limited hiatus in installment payments before it declares a license forfeit creates unacceptable uncertainty as to a lender's ability to recover its loan.^{2/} The

^{1/} Lenders will ordinarily have sufficient incentive to arrange for the assignment of the system to another DE because of the Commission's existing requirement that a non-DE acquiring a DE's license must repay the discount originally given to the DE on the successful bid price. Because the market value of a PCS system should be the same regardless of whether it is acquired by a DE or a non-DE, the obligation to pay the Commission the difference between the bid amount and the DE's discount should reduce the amount any non-DE would be willing to pay for the system. Consequently, a lender is likely to receive a higher price from a DE purchaser than from a non-DE purchaser.

^{2/} The requirement that the defaulting DE petition the Commission before it is eligible for the grace period seriously aggravates the uncertainty. First, a lender has no assurance that the grace period will be allowed at all. Second, given the processing delays inherent in any administrative process, the decision whether to grant the DE the grace period may come nearly at the end of the grace period. The uncertainty of the status of the license while the petition is pending will materially diminish the lender's ability to find a suitable buyer. Third, the installment payments will have to be resumed at the end of the grace period, allowing an extremely short period of time to workout a financial restructuring of the borrower. In many cases the lender will be required to advance the installments in order to protect its interests, thereby increasing the risks associated with the loan.

discretionary grace period approach provides neither sufficient time nor certainty; even if the time period were long enough to allow a workout or a permissible sale to another DE, neither the lender nor the licensee could afford to take the risk that the Commission might deny the request for a grace period and simply revoke the license. A defaulting licensee would be likely therefore to end up in bankruptcy, where neither the Commission nor the other parties could predict the outcome with any certainty, and all parties would be exposed to additional costs, losses and delays.

The capital that the Commission wants to insure for DEs is more than just equipment financing, because the DEs will also need working capital and acquisition funds. Lenders would be more likely to assume the risks associated with loaning the PCS acquisition costs or working capital to DEs if the lenders could be assured that the borrowers' most valuable asset would not suddenly disappear. The assets used in a PCS system reflect only a fraction of the value of the system. If lenders are not permitted to rely on the continuing value of the license and the operating system as part of the support for their loans, however, then they will limit their financing to a percentage of the equipment value. That will require the DEs to look elsewhere for working capital and other capital needs. NationsBank's proposal would reduce the lender's uncertainty and thus enhance the prospects that lenders would provide more than minimum equipment financing to winning DEs.

The Commission's proposal to declare the license forfeit upon nonpayment by a DE will also adversely affect the DE's customers, by depriving them of service, interrupting their service or forcing them to take service from others. Customers who subscribed to long-term service contracts could also suffer financially, as they would be unsecured creditors in the licensee's bankruptcy case, where the assets of the estate would be unlikely to satisfy even the demands of the secured creditors.

Further, declaring the license forfeit will reduce the value of the authorization itself and thus the amount of revenue the government will derive. Presumably, the Commission would re-auction any forfeited authorization (assuming competitive applicants existed), but any subsequent auction for the spectrum is unlikely to generate as much revenue as the initial auction. At a minimum, the second auction winner would be entering the market substantially later than its competition and would face a major uphill fight to gain market share. The value of the market would be even less if the lender had foreclosed on the PCS equipment before the second auction occurred, and the system would have to be re-built entirely. If the license is transferred to a solvent purchaser, however, the obligation to pay the Commission the spectrum price could be assumed by the purchaser.

Intercreditor Agreements

Third, the Commission's entering into intercreditor agreements with lenders, as NationsBank proposes, would

materially increase the willingness of NTFC and others to finance DE licensees. Intercreditor agreements would help preserve the value of the entire system for the benefit of both the Commission and the lender. Intercreditor agreements would assure that the lender and the government understand their relative positions and would increase the probability that the lender and the Commission would work together to assure the continued operation of a DE's PCS system if the DE encountered financial difficulties. Unless lenders can be assured in advance that the Commission will not seek to assert rights that are greater than those of a senior secured creditor, most lenders would not be willing to make any substantial loans to DEs.

Because of the uncertainty surrounding the treatment of the Commission's interest in bankruptcy, intercreditor agreements would benefit the Commission as well, by minimizing the necessity for extended and expensive litigation within the bankruptcy proceeding. Bankruptcy would raise numerous issues involving the application of the automatic stay, the nature of the Commission's interests and rights to payment, the priority of claims, the treatment of claims in reorganization and similar matters. Intercreditor agreements would encourage and facilitate pre-bankruptcy work-outs and minimize the uncertainty, costs and delay associated with bankruptcy. Even if a bankruptcy were filed, an intercreditor agreement could streamline the reorganization or liquidation process, and could enhance the

opportunity for all parties to work together in a cooperative fashion, to the ultimate benefit of all the parties.

Conclusion

For the reasons set forth above and in NationsBank's Petition for Limited Reconsideration, NTFC urges the Commission to reconsider its *Fifth Memorandum and Opinion* and to adopt the proposals advanced by NationsBank.

Respectfully submitted



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CERTIFICATE OF SERVICE

I, Cynthia T. Miller, hereby certify that on this 9th day of February, 1995, copies of the foregoing COMMENTS OF NTFC CAPITAL CORPORATION IN SUPPORT OF NATIONSBANK'S PETITION FOR LIMITED RECONSIDERATION were served by U.S. mail, first class, postage prepaid upon the following parties:

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